TESTIMONY OF

TODD F. GAZIANO

SENIOR FELLOW IN LEGAL STUDIES, AND
DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES,
THE HERITAGE FOUNDATION*

214 MASSACHUSETTS AVENUE, NE
WASHINGTON, DC 20002

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Good afternoon, Mr. Chairman and other distinguished Members of the Subcommittee. Thank you for inviting me to testify today on the operation of a law that is too often neglected. For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan public policy, research, and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. During different periods in the Reagan, Bush, and Clinton Administrations, I served in the U.S. Department of Justice, Office of Legal Counsel, where I provided legal advice to the White House and four Attorneys General on a variety of matters, including administrative law issues related to the rulemaking process.

As the Subcommittee Members also may know, I was honored to serve as a Subcommittee Chief Counsel in this body in 1996 when the Congressional Review Act (CRA) was debated and enacted. The original House version of the CRA was introduced as an amendment to another bill by Rep. David M. McIntosh, then-chair of the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, which employed me. I also had the privilege of working closely with Senator Nickles, the original Senate sponsor, and his legislative staff, as well as with House Judiciary Committee Chairman Henry Hyde and his senior staff, on the final language of the bill before it was added as a subtitle to a larger bill that was signed into law ten years ago yesterday.

I mention my personal involvement as an agent of Congress not to relate long-irrelevant details regarding the legislative debate over the CRA—and certainly not to claim any more credit than that of one of several scriveners—but simply as bearing on my detailed familiarity with its text, structure, and legislative history. To the extent that I discuss the legislative intent of the CRA and the expectations of its sponsors, I attempt to confine myself to the public record, including the joint legislative history introduced in the House and the Senate by all of the principal legislative sponsors.

Nevertheless, my personal experience probably has also caused me to think, write, and speak about the CRA more than I otherwise would as an administrative law scholar. It is therefore a special pleasure to share with you some of my thoughts about its successes, limitations, and promise as a part of our administrative law. My testimony begins with a brief statement regarding the democratic theory behind the Congressional Review Act. I then touch on the effectiveness of the CRA, discuss some interpretive issues and possible reforms to make it more powerful, and conclude with additional thoughts on how the CRA (and more extensive congressional review of agency rulemaking in general) could better approximate the separation of powers ideal.

Democratic Theory and the Separation of Powers

The Congressional Review Act requires executive agencies to submit covered rules to Congress before they may go into effect. The Act provides special procedures in both Houses that enable Congress to expeditiously consider special, unamendable resolutions of disapproval that would overrule the regulation. If passed by Congress, such resolutions of disapproval are then presented to the President for his signature or veto as is the case with any other bill.[1]

Before turning to more practical issues, it is helpful to note that the Congressional Review Act was intended to increase democratic accountability for rulemaking and to reinvigorate, at least in a minor way, one aspect of the constitutional separation of powers that has been weakened over time. In

[1] For a more detailed discussion of the operation of the Act, see Morton Rosenberg, "Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years," CRS (March 27, 2006).

short, the Framers would have approved of a device like the CRA because it reinforces the constitutional scheme that they so carefully crafted.

The Framers' concern was tyranny, not just by a monarch, but by his many administrative officials as well. One of my favorite passages of the Declaration of Independence lists this as a justification for revolution: "He has erected a multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance." Agency bureaucrats can be as dangerous and harassing today as they were in 1776—unless they are constrained in some meaningful way.

One of the most important devices adopted by the Framers to prevent tyrannical government was the separation of powers. The Framers were familiar with Montesque's admonition that there can be no liberty where the legislative and executive powers are united in the same official. This idea of separating government powers had begun to be implemented in the colonial governments and later in the state governments at the time of the framing of the United States Constitution.

The separation of powers is expressed in various ways in the Constitution, including the structure of the Constitution and several of its explicit provisions. Nevertheless, Madison acknowledged a common fear of the proposed government when he noted in *Federalist 46* that, "The accumulation of all power, legislative, executive and judiciary in the same hands may justly be pronounced as the very definition of tyranny." (This formulation actually trumps Montesque's.) In several of the subsequent *Federalist Papers*, Madison explained that citizens need not fear that the new Constitution neglected the separation of powers. The Constitution, he argued, would keep the powers of government more effectively separated than the early state governments because it pitted ambition against ambition to keep the different branches of government perpetually in check.

The clearest expression of the separation of powers can be found in the vesting clauses, which are the first sentences of Articles I, II, and III. Article I begins thus: "All legislative Powers herein granted shall be vested in a Congress of the United States..." Article II begins in a similar fashion: "The executive Power shall be vested in a President…" And Article III begins with an analogous grant of power: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Note there is no mention of independent agencies, or anything else "independent" for that matter. [2]

As this Subcommittee knows, the purpose of the separation of powers was not to protect government officials' power for sake of those officials, but to protect individual liberty. Power was understood to be corrupting, and the more power concentrated in one person or branch, the greater the threat to liberty. It was for this reason that the Framers struggled to divide the necessary powers of the government. But they also paid special attention to keeping them separate for the long run.

What legal scholars and historians refer to as the delegation (or nondelegation) doctrine is a necessary corollary to this separation of powers framework. As it applies to Congress, it is the simple notion that Congress may not delegate its core legislative power to the executive or judicial branches or to other entities. Congress must write the laws itself. It cannot delegate the law-writing power because that would upset the balance of powers and ultimately endanger our individual liberties.

[2] Executive branch agencies include many so-called "independent" agencies. Congress may designate an agency as "independent" for various statutory purposes, but all agencies that exercise significant discretion under the laws of the United States are in the executive branch for constitutional purposes. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988).

When does Congress's delegation of rulemaking authority to executive branch agencies cross the line between filling in administrative gaps in the laws Congress has enacted and actually writing what are the equivalent of new laws? This is one of the more difficult questions of constitutional law. The Supreme Court once policed this line actively, but it has largely abdicated this responsibility since the late 1930s.[3] Nevertheless, there are still some clear limits on delegated authority beyond which Congress cannot go.[4] Although Congress's delegation of rulemaking power may be very broad, it cannot be completely standardless. Recent decisions of the Supreme Court have held that a law that authorizes rulemaking must contain an "intelligible principle" to guide agency action.

The most significant recent pronouncement by the Supreme Court was a disappointment to those who had hoped for a minor re-invigoration of the nondelegation doctrine. In *Whitman v. American Trucking Association*, the Court found an "intelligible principle" in the Clean Air Act that grants the EPA extremely broad discretion to regulate thousands of potential pollutants, even if those rules impose billions of dollars in costs and bankrupt entire industries.[5] Some might reasonably wonder whether the discretion accorded to the EPA amounts to "the accumulation of [practically] all power, legislative, executive and judiciary in the same hands" that Madison equated with the "very definition of tyranny." No matter how well meaning it might be, the EPA decides what pollutants to regulate, how specifically to control those pollutants, and when and where its regulations apply. It then writes voluminous rules, enforces its own regulations, and adjudicates many actions subject to a very limited and deferential standard of judicial review.

Only Justice Thomas expressed serious concern with the delegation in *Whitman*, though he cast his opinion as a concurrence because the issue was not properly raised by the litigants. Thomas's opinion is wonderful, as usual. My paraphrase of his opinion is this: 'I agree the Clean Air Act has an intelligible principle, like other laws the Court has heretofore approved. But that is not the relevant test under the Constitution. The Constitution confers *all* legislative powers to Congress. The real question is whether the delegation is anything other than legislative.'[6] According to a solid majority of justices still on the Court, however, Congress need only provide vague but intelligible principles to enable the executive to legislate as it sees fit. This is not the separation of powers ideal.

That the courts allow Congress to delegate sweeping regulatory power to executive agencies does not mean it *should* do so, especially when it exercises no further control over the matters delegated. With broad delegation now the norm, Congress ought to increase oversight and control over the agency rulemaking process. In other words, if the delegation doctrine is on life support, then Congress must devise other procedures to approach and reinforce the separation of powers ideal. The Congressional Review Act was a small step to restore constitutional government and the constitutional separation of powers. The joint statement of its principal sponsors expresses that intent:

> As the number and complexity of federal statutory programs has (sic) increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulation is often more complex by several orders of magnitude. As more and

[3] Legal scholars continue to debate the appropriateness of this change, but almost all agree that the courts have significantly increased the deference they accord to congressional delegations of regulatory authority since the late 1930s.
[4] For example, the Supreme Court still has not overruled its early New Deal cases of *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[5] 531 U.S. 457, 472-76 (2001).
[6] 531 U.S. at 486-87 (Thomas, J., concurring). Thomas ends his three-paragraph concurrence expressing a willingness to address that specific question in a future case.

more of Congress'[s] legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

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Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.[7]

Evaluating the Effectiveness of the CRA.

1. Enhanced public recordkeeping of agency rulemaking.

Prior to the CRA, the public record of agency rulemaking was even spottier than it is today. Only certain regulations must be published in the *Federal Register*, and the *Federal Register* includes many proposals and other materials that are not final rules. The CRA's broad definition of a rule was chosen for several reasons, among them to help Congress and its supporting agencies to catalogue the corpus of agency rules that affect the public. As its text and legislative history make clear, the CRA was not designed to cover matters related to agency internal management or organization but was intended to cover any "agency statement of general applicability and future effect" that substantially affects the rights or obligations of those outside the agency. Notice-and-comment rules, interpretive rules, and guidance documents all fall within this standard.[8]

Although this broad definition should encompass almost every final agency statement that affects the public, investigations by GAO and the Government Reform and Oversight Committee have confirmed that agencies are not submitting all covered rules as the CRA requires, and instead, are principally submitting only those that are published in the *Federal Register*.[9] It is also problematic that OMB has not satisfactorily complied with a separate mandate that it issue guidance to the agencies to improve compliance with the CRA.[10] That could change if the regulated community prevails in one or more high profile challenges to, for example, an agency guidance document or handbook that was never sent to Congress.

I defer to the other witnesses to describe the number and nature of the rules that have been filed

[7] 142 Cong. Rec. E571, E575. *See also* 142 Cong. Rec. 6922 and 142 Cong. Rec. S 3683 (containing the identical joint legislative history of the CRA).
[8] *See* 5 U.S.C. §§ 551 and 804(3).
[9] *See* Morton Rosenberg, CRS Report, *supra* note 1, at 24-27 and accompanying citations.
[10] *Id*. at 27 and note 46.

with Congress pursuant to the CRA. Undoubtedly, though, the catalogue of approximately 41,800 major and non-major rules, together with required reports on agencies compliance with various statutory and presidential review requirements, is a valuable resource for Congress and scholars of the regulatory process.

2. Changing agency rulemaking behavior.

The CRA probably has not been invoked as often as its sponsors and early commentators had expected, but that does not mean that it has had no impact on agency behavior and legislative accountability. Anecdotal evidence suggests that Congress has influenced controversial rules by invoking the CRA. Even if the number of rules so influenced has not been large, this evidence demonstrates that the CRA gives Congress some additional leverage with agencies—when Members choose to use it. This may influence agencies' work on controversial rules even when the CRA is not invoked and even though Congress has made little direct use of its power to overturn rules.

The Occupational Safety and Health Administration's ergonomics rule is the only rule overturned by a resolution of disapproval that became law.[11] Some, including my distinguished co-panelist Morton Rosenberg, argue that the ergonomics rule is a *sui generis* example because it was promulgated at the end of one administration and was not supported by the incoming administration. There is much truth to this observation, but that is still an important use of the CRA. Putting a check on midnight regulations that might bankrupt entire industries and needlessly strain our economy is valuable. Regulations should not be rushed to publication in the face of expected opposition by the democratically elected President-elect. Among its other purposes, the CRA exists to undo such regulations that a lame-duck administration has attempted to finalize.

There are other advantages to using the CRA to overturn a controversial major rule rather than relying on the next administration to attempt a repeal of the rule. An agency repeal is costly and time-consuming, and depending on the statute that authorized the rule, the attempt might be subject to lengthy litigation. If successful, repeal may create inequities between citizens who were subject to agency enforcement actions before and after the repeal. Under the CRA, however, rules may be overturned relatively quickly, with little legal uncertainty. Moreover, rules disapproved pursuant to the CRA are treated as if they were never in effect, eliminating any inconsistencies in treatment.

Nevertheless, the effect of the CRA is lessened over time if it is used in only rare cases. The CRA would have a greater impact on agency behavior if Congress used it even a few times to invalidate rules during the middle of an administration. In geopolitical terms, just a few missiles in the hands of an emerging state can change the balance of power in an entire region. One OMB official described the CRA as a Minuteman Missile, deterring conduct by its mere existence. For this analogy to ring true, however, there would have to be a credible threat of that missile being launched.

One reason Congress may not have used the CRA as often as anticipated is that Congress has other tools at its disposal, such as legislative riders on appropriations bills, to accomplish the same end. With recent interest in reforming the appropriations process, these other tools may become disfavored.

One clear limitation of the CRA is that a president might be inclined to veto any resolution disapproving a rule that made it though his own regulatory review process. Yet, this limitation should not be exaggerated to the point that it becomes a self-fulfilling prophesy—or is never tested because

[11] See Public Law 107-5 (2001).

Congress offers no resolutions to veto. There are at least three reasons why a president might not veto a resolution of disapproval regarding a rule issued by his administration:

(a) The rulemaking may be one mandated by Congress that the president is not particularly fond of. In short, a president may not like each rule some long-ago Congress set in motion just because it came to fruition in his administration.

(b) The rule may be issued by one of the so-called "independent" agencies Congress has attempted to insulate from direct presidential control. In such case, the president may have had fewer opportunities to shape the rule's final development. For this or similar reasons, the president might prefer to have the particular agency (which may soon have more of his own appointees in office) start over and draft a substantially different rule.

(c) A president may simply be reluctant to veto any legislation and decide that a particular resolution of disapproval is not worth making an exception to his usual practice.

But even if a president did veto a resolution of disapproval for a rule issued by his administration and the Congress could not immediately override his veto, there are two positive outcomes from the standpoint of democratic theory. The first is that the president would be more directly accountable for the regulation. His administration could not hide behind the "Congress-made-me-do-it/we-had-no-discretion-but-to-issue-the-regulation" excuse.

The Framers intended that the president be personally responsible and accountable for his administration. To this end, the Framers rejected several proposals at the Constitutional Convention for a Council of Revision and for a constitutional Privy Council for fear that the president would hide behind their advice and that would diminish his accountability to the people.[12] The Framers even changed early drafts of the Opinion Clause of the Constitution to ensure that any advice to the president and any cabinet government was initiated and dispensed with at the president's choosing.[13] With the growth of the administrative state, Congress must restore of the lines of accountability so that modern presidents are not able to hide behind agency officials with supposed technical expertise.

The second beneficial result of a veto would be to set other democratic forces in motion. Congress often can find ways to enforce its will without directly overriding the president's veto, such as by including a vetoed measure in a must-pass bill or employing other political means. CRS recently estimated that 95 percent of all recent earmarks were contained in report language or other non-binding legislative documents.[14] The president could legally ignore all of these earmarks, especially if he seeks (as all modern presidents do) line-item veto authority. Nevertheless, modern presidents abide by almost all report-language earmarks for the simple reason that upsetting powerful members of Congress is costly. Creative minds can craft a variety of exceptions, interpretations, and other enforcement guidelines than can significantly alter the enforcement decisions of a particular agency.

3. Enhancing legislative accountability for agency rulemaking.

The CRA has enhanced legislative accountability for agency rulemaking even if it could be

[12] *See* Todd Gaziano, "Opinion Clause," in *The Heritage Guide to the Constitution*, pp. 201-03 (Edwin Meese III, et al., eds., Regnery 2005).
[13] *Id*. The Opinion Clause is Art. II, § 2, cl. 1.
[14] *See* Robert Novak, "Bush cool to idea to cut spending," *Chicago Sun-Times*, March 27, 2006.

shown that the CRA has not substantially changed agency behavior or improved the regulations that are issued. By its action or inaction, Congress is now more accountable for agency rules. This is analogous to the increased presidential accountability when Congress does pass a resolution of disapproval. The president is directly accountable, whether he signs or vetoes the resolution.

In short, the CRA makes it much more difficult for the president and for Congress to avoid their respective share of responsibility. Like the president, Members of Congress sometimes play the blame game to the detriment of responsible government. Public choice theory suggests that congressional authorizers have the most to gain if they can claim credit for doing something about a perceived public problem but shift the costs of decision-making to someone else. By passing a vague law, they may claim credit for the perceived good, and if the agency writes regulations that are unpopular, they can often shift the blame onto the "out-of-control" agency. That's the best of both worlds for a politician but the worst of all worlds for the body politic.

The predictable, and sometimes truthful, response from an agency official who issues an unpopular regulation is "Congress made me do it." As discussed, the president can hide behind this response as well, unless Congress takes positive steps to disapprove the regulation. As ever, success has a thousand fathers, but no one takes responsibility for a misguided or unpopular regulation. The CRA makes it harder for Congress to claim that an agency is "out of control" because Congress can more clearly control the rules agencies write now.

Some in Congress never liked the Congressional Review Act because it does help, in a minor way, to increase political accountability for agency rulemaking. After overturning the ergonomics regulation in 2001, many Members now appropriately see the CRA as a double-edged sword. The CRA's congressional sponsors always understood this.

Agency claims that they have no discretion in the issuance of particular regulations present special concerns, and the CRA applies to them in a unique way. If such a claim is true, the CRA refocuses attention on who is responsible and gives Congress an easy opportunity to reconsider the underlying mandate. Too often, however, an agency's claim of limited discretion is overstated. With enactment of the CRA, trying to shift blame to Congress became riskier. If Congress accepts the agency's claim and disapproves the rule anyway, the agency's future range of discretion is narrowed even more, and possibly eliminated, because the agency is forbidden from re-issuing a substantially similar rule without express congressional authorization.

Agencies' attempts to avoid responsibility will not disappear, but they are now more difficult, as they should be in a functioning democracy. Likewise, Congress has made itself more accountable for agencies' rules, whether it exercises its authority under the CRA or not. To the extent that the CRA has serious limitations, Congress should consider further reforms.

Even without changes to the statute, Congress can take several steps to make better use of the CRA. Members, especially committee chairs, should conduct oversight during the rulemaking process of particularly problematic rules and cite the potential for CRA disapproval when communicating with agency officials. Congress should not cross the line and attempt to micromanage proper executive functions under other chapters of the Administrative Procedure Act, but it ought to express itself forcefully if an agency proposes a rule that is strongly opposed by a majority in Congress. After the ergonomics rule disapproval, this threat carries some weight.

The earlier Congress engages in the rulemaking process, the more effective Congress's

engagement will be. Although some tools Congress has used to investigate enforcement actions are inappropriate (such as depositions of career staff), broad oversight of the rulemaking process is justified because modern rulemaking is at least quasi-legislative to begin with. It is arguably Congress's power that is being exercised. Active congressional involvement is appropriate to rein in agency excess or simply a few bad regulations.

And if a statute really does require an agency to issue a particularly draconian rule, Congress still can use the expedited procedures of the CRA to change course or make a corrections. No one is immune from the law of unintended consequences. Congress should not pretend that it has perfect foresight either. In sum, Congress should use the CRA to correct its own mistakes as well as those of executive agencies.

Resolving Interpretive Issues

Morton Rosenberg's report for the Congressional Research Service on the CRA is helpful in discussing various issues of CRA statutory interpretation that remain unresolved.[15] For the most part, I agree with his analysis and conclusions regarding the proper resolution of those issues, but I add a few thoughts here as well.

(a) Courts should not consult legislative history unless the text of the statute is inherently ambiguous, and courts should give some types of legislative history evidence more weight than others. Nevertheless, there are several reasons why the courts should accord the Joint Explanatory Statement of the House and Senate Sponsors of the CRA greater weight than is normally granted to post-enactment legislative material.

First, the Joint Explanatory Statement is the only document written by the sponsors and relevant committee chairmen responsible for the legislation. It does not conflict with other committee reports because there are none. Second, it is found in the Congressional Record in the House on the day of passage. See 142 Cong. Rec. 6922-6930 (March 28, 1996). My own memory is unreliable and I have not found a unanimous consent request that would have permitted such a placement, but without contrary evidence, the courts should accord a presumption of regularity to the proceedings of the coordinate branches. Thus, there is every reason to conclude that at least the House collectively wanted the Joint Explanatory Statement to be treated as a contemporaneous legislative history. Third, even if deemed "post-enactment" legislative history, it is only a few weeks post-enactment. Some of the reasons to be distrustful of such material remain, but the Statement was not written in the midst of litigation or an ongoing battle with the executive branch. The Statement is not a mere "litigation position." Finally, it has many of the hallmarks of a joint conference report, explaining the nature of the compromises between earlier House and Senate versions and containing a brief legislative history, a summary of major provisions, definitions, etc. It was not written with a narrow purpose to affect one provision or change the legislative debate. Indeed, its general purpose, to substitute for a conference report on the CRA, is set forth at the beginning of the Statement's coverage of the Act.

(b) The most important unresolved issue may be the scope of the limitation on judicial review in section 805. The key question is this: may a court recognize that a rule has no legal effect due to the undisputed fact that it was not delivered to Congress as required by the CRA? The text of the limitations provision is somewhat ambiguous, and the text of other sections of the CRA further compounds the ambiguity. For example, section 801(g) contains a separate prohibition on courts

[15] Morton Rosenberg, CRS Report, *supra* note 1, at pp.23-39.

inferring any intent from Congress's failure to enact a resolution of disapproval. If the limitation on judicial review in section 805 were absolute, there would have been no reason for Congress to include section 801(g).

Where possible, statutes must be read not to render one of their provisions irrelevant. I agree with Morton Rosenberg that the Department of Justice's interpretation and two early court decisions on section 805 are not persuasive and that court decisions on analogous statutes are on point. The legislative history explains how to resolve the apparent ambiguity. The courts may consider pure issues of law relating to whether certain rules or laws are in effect—e.g., what legal effect to give enacted resolutions of disapproval and whether regulations are or are not in effect as a matter of law. Subsidiary determinations of fact or matters involving internal congressional procedure, such as a major rule determination by the Office of Information and Regulatory Affairs or each House's determinations regarding its calendar and the applicability of the expedited review provisions, are not subject to judicial review.

This issue merits special attention by this Subcommittee in the future. To the extent that the courts are not consistent in interpreting the limitation on judicial review in this way and read it as a complete bar on any judicial review of the effectiveness of a rule that was never submitted to Congress, the Judiciary Committee should consider legislation to clarify the matter and affirm the judgment of the court in *United States v. Southern Indiana Gas and Electric Co.*[16] Mort Rosenberg's analysis is persuasive that the absence of any judicial review on the triggering mechanism of the CRA would permit the complete frustration of its purpose. The legislative history shows that the original sponsors did not expect that result. Whether the limitation on judicial review currently is ambiguous or not, this Subcommittee should ensure that limited judicial review is available in the future.

Potential Improvements in Congressional Review Procedures

Proposals for improved screening mechanisms to pinpoint rules that need congressional review also are worthy of serious consideration. As a separation of powers matter, it makes no sense for Congress to be so seriously outmanned compared to the executive branch when it comes to the review of regulations issued by the ever-expanding administrative state—especially when rulemaking is at least a quasi-legislative endeavor. (In my view, some regulations are purely legislative and beyond the constitutional power of Congress to delegate, but a majority of the Supreme Court is not currently persuaded of this view. See *infra*.)

Congress does not need as many people to review final rules as the executive branch employs formulating them. In my view, Congress needs the equivalent of an Office of Information and Regulatory Affairs and it needs to increase the regulatory staff of its substantive authorizing committees. Evaluating a cost-benefit analysis does not take the same manpower as performing it originally, but evaluation does require a similar expertise and management direction. At the committee level, it does not even require the same level of technical expertise as that relied upon by an agency to identify the outside witnesses and experts who can help the committee examine a particular rulemaking record and agency determinations. An additional number of smart and dedicated generalists who can aid the committee to find the right experts is all that is essential.

H.R. 1704 in the 105th Congress and H.R. 3356 in the 108th Congress would create different congressional institutions to focus attention on rules that need congressional review, and both are

[16] 55 ERC (BNA) 1597 (D. S.D. Ind. 2002).

respectful of existing lines of committee jurisdiction. H.R. 3356 has the additional advantage of meshing well with the CRA by amending its review provisions. It seems presumptuous of me to comment further on what is best for your internal organization. Moreover, the perfect often is the enemy of the good in such reform debates. But Congress should do something, both to create more effective centralized management of congressional review responsibilities and to increase the total number of committee staff devoted to the review of agency regulations.

Reinvigorating The Separation of Powers Ideal

1. Congressional approval of agency rules.

H.R. 931 in the 109th Congress and similar bills introduced by different Members over the past ten years would go much further than focusing Congress's attention on particular rules for possible disapproval. They would require that certain covered rules must be statutorily ratified or approved before they could go into effect. To avoid constitutional problems, such a reform statute would have to amend existing and future grants of regulatory authority so that the affected agencies could not issue certain types of final rules. Instead, agency authority for certain matters would be to conduct hearings, formulate, and propose final rules to Congress.

One disadvantage with the language of H.R. 931 is that it would not amend the CRA but would supersede it. Proposals from prior Congresses would use the major rule definition in the CRA and amend the Act to require that major rules receive congressional approval. A practical argument for such a change is that major rules often have a bigger impact on the American economy than many of the laws Congress enacts. This Subcommittee conducted hearings on at least one such proposal in the year after the Congressional Review Act was enacted. These extremely valuable proposals have already received commentary in the administrative law literature, not the least of which by two of us on this panel.[17] With a further expression of interest by the Subcommittee, I would be happy to elaborate on the virtues of such proposals in reinvigorating the separation of powers ideal.

2. Preventing abuses of the criminal law.

The House and Senate Judiciary Committees should also act to curb the disturbing trend of agencies (aided in large part by other authorizing committees) creating a host of new regulatory offenses punishable by criminal sanctions. The operation of the criminal law is the government's most awesome and fearful tool from the standpoint of individual liberty. Traditionally, crimes were limited to offenses that were known to be inherently wrongful and done with a malicious intent (e.g., intentional killing, theft, battery). It makes sense to punish these traditional and knowingly culpable acts with special sanctions, but special protections of liberty were developed as well.

Some of those protections are still present in the courts, but Montesque's old fear did not extend to the trial process. Montesque's admonition was that there can be no liberty where the legislative and executive powers are united. That warning haunts us today as criminal offenses are increasingly being written and enforced by the same administrative agencies. At least in this one area, Congress should reserve to itself the power to write criminal laws and thereby separate the drafting and enforcement of the criminal code.

[17] *See* Todd Gaziano, "Can the Separation of Powers Endure the Age of Muddled Thinking?," *Regulation*, vol. 20, no. 1 (1997); Morton Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform," 51 *Admin. L. Rev.* 1051(Fall 1999).

The U.S. Constitution mentions only three federal crimes, and yet it has been estimated that there are now some 4,000 federal crimes and that this is an increase of roughly 1,000 federal crimes in the last decade alone.[18] Many of these offenses do not fit within the traditional categories of criminal law, and unfortunately, many of them do not concern inherently wrongful conduct (what the law refers to as *malum in se*) but violations of norms that are only wrongful because Congress has declared them to be so (what the law would label *malum prohibitum*). As bad as the proliferation of federal statutory crimes is—particularly the newer crimes that are not inherently wrongful—the proliferation of regulations punishable by criminal sanctions is even more troubling.

Typically, Congress passes a statute that makes the violation of some future agency regulation a crime. Such laws may even include criminal penalties for violations of permitting schemes, with the terms of every permit being different. Often the only intent requirement is that the defendant knew that he was taking certain actions and not that the actions violated the permit or the regulation. The civil liberties concerns associated with these schemes make those raised in the homeland security context pale in comparison.

The Congressional Research Service seemingly is unable to estimate how many federal regulations now carry criminal penalties.[19] The American public has no chance of mapping the contours of regulatory criminal law, a basic prerequisite to following the law and avoiding criminal punishment.

Congress should enact a prohibition against crimes being defined in agency regulations. If it is serious enough to criminalize, Congress should define the offense. In the alternative, agencies should only be allowed to propose such crimes, which Congress could then enact with resolutions of approval.

Conclusion

Those who would declare the Congressional Review Act moribund mistake dormancy for a lack of any potential vitality. Reconstruction era statutes enacted to protect the civil rights of newly freed slaves lay largely dormant for about 100 years before private litigants rediscovered them. They have been used extensively ever since to vindicate fundamental civil rights for all Americans. The Alien Tort Claims Statute (really just one brief section of a larger act) was passed by an early Congress in the eighteenth century and has been rediscovered by private litigants almost 200 years later and validated by the Supreme Court. The CRA's impact in its first ten years has not been dramatic, but that does not dictate its future course.

Both Congress and private litigants have an opportunity to make better use of the CRA in the next decade (the latter if the effectiveness of a rule that was not submitted to Congress is subject to judicial review). Congress has both an institutional interest to re-assert its legislative primacy and an obligation to the American people to safeguard our liberties. The constitutional separation of powers requires no less vigilance.

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[18] John S. Baker, Jr., "Measuring the Explosive Growth of Federal Criminal Legislation," The Federalist Society for Law and Public Policy Studies, available at www.fed-soc.org.

[19] *See* Paul S. Rosenzweig, "The Over-criminalization of Social and Economic Conduct," Heritage Foundation Legal Memorandum No. 7, at 2 and note 3 (2003). Our understanding is based in part on conversations we have had with congressional staff, who have supposedly requested the information, and in part on informal conversations we have had with senior CRS officials. We would be happy to be proven wrong about CRS's ability to reliably estimate the number of crimes defined in regulations, e.g., if they provided a reliable number.